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SUPERIOR COURT OF THE STATE OF CALIFORNIA

MARIN COUNTY JUDICIAL DISTRICT

HON. JOHN A. SUTRO, JR., JUDGE

DEPARTMENT H

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CV ANTHONY II, LLC, )  
Plaintiff, )  
vs. ) No. CV 095267  
DOYLE HEATON, )  
Defendant. )  
\_\_\_\_\_)

REPORTER'S TRANSCRIPT OF EX PARTE HEARING

Tuesday, October 20, 2009

APPEARANCES:

For the Plaintiff: STEVEN A. SIMONTACCHI, ESQ.  
PHILLIPS, DOWNS & SIMONTACCHI  
55 Shaver Street, Suite 330  
San Rafael, CA 94901

For the Defendant: MIR SAIED KASHANI, ESQ.  
800 W. 1st Street, Suite 400  
Los Angeles, CA 90012

Reported by: CHRISTINA GILSON, CSR NO. 9824

1 TUESDAY, OCTOBER 20, 2009

9:10 O'CLOCK A.M.

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5 THE COURT: CV Anthony versus Heaton.

6 MR. SIMONTACCHI: Good morning, your Honor. Steve  
7 Simontacchi appearing on behalf of the plaintiffs,  
8 CV Anthony.

9 MR. KASHANI: Good morning, your Honor. Saied  
10 Kashani on behalf of defendant Doyle Heaton.

11 THE COURT: This is awkward having somebody appear  
12 ex parte on court call.

13 MR. KASHANI: I'm sorry, your Honor. I'm actually  
14 in Reno this morning on a scheduled appointment. I asked  
15 counsel if he could move it a day or so so I could appear  
16 in person and --

17 THE COURT: There is an opposition. I have not  
18 even looked at the papers and I have a jury coming in at  
19 9:30, so I'm going to have to take a look at the papers and  
20 see what's here.

21 And, Mr. Kashani, you're just going to have to sit  
22 on the phone until I've finished taking a look at the  
23 papers here.

24 MR. KASHANI: Very well, Your Honor. Would it be  
25 more convenient for the Court if I called back?

26 THE COURT: No, I don't think so. Since you're

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1 appearing here, you're just going to have to wait.

2 MR. KASHANI: No problem, your Honor. I'm here.

3 THE COURT: All right. So just have a seat. I'll  
4 take a look at these as quickly as possible.

5 MR. SIMONTACCHI: Thank you, your Honor.

6 (The Court retires to chambers to review  
7 documents.)

8 THE COURT: All right, counsel, I've reviewed the  
9 papers.

10 I think a good place to start, Mr. Simontacchi,  
11 would be for you to respond to the objections raised by  
12 Mr. Kashani.

13 MR. SIMONTACCHI: Sure, your Honor.

14 The first point made in counsel's opposition is he  
15 claims that the complaint was premature and that the  
16 default due date had not occurred yet. And if you look  
17 actually at the note, which is attached as Exhibit C --

18 THE COURT: Wouldn't it be D?

19 MR. SIMONTACCHI: Excuse me. Going to the  
20 declaration of Dan Morgan and Exhibit D, page 2 of 2, in  
21 paragraph 5, which is entitled "Acceleration," it states  
22 that, "In the event of a default in the payment of any of  
23 the installment payments set forth herein when such  
24 payments are due as herein provided --" and here is the  
25 key. In parentheses, it says, "-- which default is defined  
26 as 15 days after the scheduled due date." The scheduled

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1 due date, undisputedly, was October 1st, so 15 days after  
2 the scheduled due date is October 16th. By definition, a  
3 default has occurred on October 16th.

4 The complaint was filed on October 16th. And,  
5 regardless, even if counsel's argument had merit, which I  
6 believe it does not for the foregoing reasons, the payment  
7 was not made on October 16th. And the complaint was  
8 subserved over the weekend.

9 So that would be my response to his first  
10 argument, is that as of October 16th, there was a default  
11 as defined.

12 THE COURT: Right. Okay.

13 MR. SIMONTACCHI: The second argument he makes is  
14 that there -- a writ cannot attach when there is a deed of  
15 trust. There is no deed of trust.

16 The note, itself, which this is Exhibit C to Dan  
17 Morgan's declaration, as counsel has pointed out at the  
18 bottom of Exhibit C, page 1 of 3, there is a paragraph  
19 entitled "Lender's Election to Secure the Note."

20 Mr. Morgan has declared in his declaration under  
21 penalty of perjury in paragraph 18C that this debt is not  
22 secured by a deed of trust.

23 In fact, there is no deed of trust recorded.  
24 There is no deed of trust executed and signed by  
25 Mr. Heaton. And if there were such a deed of trust, I  
26 would assume Mr. Heaton's counsel would have provided a

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1 copy of that. So there is no deed of trust.

2 Thirdly, with respect to exigency -- there is no  
3 exigency argument and it refers to boilerplate allegations  
4 of insolvency. This is the strongest basis for the writ  
5 because insolvency is defined by statute. And I have  
6 quoted it in the points and authorities on page 7. At the  
7 bottom of page 7, Code of Civil Procedure Section 485.010  
8 Subdivision B, and it states, "Under the circumstances of  
9 the case, it may be inferred that defendant has failed to  
10 pay the debt underlying the requested attachment." There  
11 is no issue there. "And the defendant is insolvent in the  
12 sense that the defendant is generally not paying his or her  
13 debts as those debts become due, unless the debts are  
14 subject to a bona fide dispute."

15 Mr. Morgan's declaration points out and  
16 establishes that there is undisputedly a restructuring of  
17 debts going on. There is the existence of other debts, no  
18 less than a dozen. Mr. Heaton is working with Mr. Huntly,  
19 who is a financial consultant restructuring firm, so there  
20 is undisputedly other debts that he is in the midst of a  
21 plan and strategy to avoid those debts.

22 I believe clearly by the declaration and the  
23 exhibits attached to Mr. Morgan's declaration, specifically  
24 Exhibit E, which was his contemporaneous notes of his  
25 conversation with Mr. Huntly, and Exhibit F, where  
26 Mr. Huntly responded and acknowledged that he needs to

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1 reach settlements with unsecured lenders on a discounted  
2 basis.

3 Furthermore, his financial statement -- and that's  
4 detailed in the declaration -- lists approximately a dozen  
5 debts.

6 So I believe the Subsection B of this 485.010  
7 regarding insolvency is clearly met by the declaration.

8 And finally, the inconsistency and pleadings is  
9 not a viable argument because --

10 THE COURT: I don't think you need to even address  
11 that. All right.

12 Okay, Mr. Kashani, anything more you want to say?

13 MR. KASHANI: Yes, a couple of things.

14 First, I think this whole thing shows a problem  
15 with the ex parte procedure. I think the note is ambiguous  
16 on the points that they raised and that's something that's  
17 very difficult to resolve on an ex parte situation.

18 The note says, at the end, that the note shall be  
19 secured by a deed of trust. I mean, that's what the note  
20 says. If they didn't record a deed or something, I can't  
21 address that. Again, we only got these papers yesterday.

22 But I think the main thing is exigency. If we  
23 actually look at the declaration of Morgan, which I just  
24 received this morning, the only evidence of exigency is  
25 hearsay from the financial consultant who is not  
26 established to be a representative and spokesman of

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1 Mr. Heaton.

2 On the other hand, if we look at the actual  
3 financial statement attached as Exhibit 8 to Mr. Morgan's  
4 declaration, it shows a net worth of \$12 million of  
5 Mr. Heaton, the defendant. So there is a lot of ambiguity  
6 here.

7 The hearsay under the Code will not support a ex  
8 parte attachment. At best, his support for exigency is  
9 hearsay from a financial consultant.

10 And I point out, too, that in paragraph 23 of his  
11 declaration, Mr. Morgan says that he sent an email to  
12 Mr. Huntly with a copy of his notes and he wrote back that  
13 most points are accurate but some were incomplete and  
14 incorrect. So even as to the hearsay presented, there is  
15 doubt as to the situation, but most importantly, the only  
16 basis of exigency is hearsay. Hearsay will not support a  
17 writ of attachment on an ex parte basis. That's in the  
18 Code.

19 THE COURT: All right. Go ahead.

20 MR. SIMONTACCHI: May I briefly respond? The deed  
21 of trust -- there is no deed of trust.

22 THE COURT: That's correct.

23 MR. SIMONTACCHI: CCP Section 486.010 and Section  
24 482.040, for purposes of a temporary protective order, does  
25 allow hearsay in a declaration.

26 THE COURT: All right. With regard to that point,

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1 particularly, I think that the showing that the plaintiff  
2 has made, just based on its dealings with Mr. Heaton, is  
3 sufficient to show, I think, some dishonesty and lack of  
4 candor in business dealings because that's the whole basis  
5 for the parties' having entered into a settlement agreement  
6 to start off with.

7 And so it appears to me that the plaintiff has met  
8 the requirements of the Code of Civil Procedure and  
9 specifically that the claim upon which the attachment is  
10 based is one upon which an attachment may be issued; that  
11 plaintiff has established the probable validity of the  
12 claim upon which the attachment is based; that the  
13 attachment is not sought for a purpose other than the  
14 recovery on the claim upon which the attachment is based;  
15 that the amounts to be secured by the attachment is greater  
16 than zero.

17 Further, with respect to the ex parte aspect of  
18 the matter, that it may be inferred that there is a danger  
19 the property sought to be attached be concealed,  
20 substantially impaired in value or otherwise made  
21 unavailable to levy if issuance of the order is delayed.

22 And that it also may further be inferred that  
23 Mr. Heaton has failed to pay the debt underlying the  
24 requested attachment and is insolvent in the sense that  
25 he's generally not paying his or her debts as those debts  
26 become due.

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1           And there is no showing that any of those debts is  
2           subject to a bone filed dispute.

3           So I think, under the circumstances, the Court is  
4           mandated to issue the attachment and order, so I'm going to  
5           do that.

6           It is denominated a temporary protective order  
7           which -

8           MR. SIMONTACCHI: Rather than a right to attach  
9           order?

10          THE COURT: Excuse me.

11          MR. SIMONTACCHI: The temporary was in the  
12          alternative.

13          THE COURT: In the alternative. Okay.

14          MR. KASHANI: Your Honor, if I could be heard on  
15          that point?

16          THE COURT: No, I don't think there is any  
17          necessity for further argument here. I'm going to sign the  
18          right to attach order.

19          MR. SIMONTACCHI: Thank you, your Honor.

20          And I do have a bond and undertaking as required  
21          by the Code which I will forthwith go up and file.

22          THE COURT: All right. And that's provided for in  
23          the order here. I think the order is in the appropriate  
24          form.

25          MR. SIMONTACCHI: Yes.

26          THE COURT: All right. Okay. I think that's it,

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1 at this point.

2 So thank you, counsel, both of you, for bearing  
3 with me --

4 MR. SIMONTACCHI: Thank you, your Honor.

5 THE COURT: -- while I reviewed the papers.

6 Mr. Kashani, I appreciate your patience in the  
7 matter, as well.

8 MR. KASHANI: No problem, your Honor.

9 THE COURT: Okay. Thank you both.

10 MR. KASHANI: Thank you.

11 (Whereupon, the proceedings were concluded.)

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1 STATE OF CALIFORNIA )  
2 ) ss.  
3 COUNTY OF MARIN )  
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6 I, CHRISTINA GILSON, an Official Shorthand  
7 Reporter for Marin County Superior Court, in and for the  
8 County of Marin, do hereby certify that the foregoing  
9 Reporter's Transcript is a full, true and correct  
10 transcription of my shorthand notes taken of the  
11 aforementioned proceedings at the time and place therein  
12 indicated.

13 IN WITNESS WHEREOF, I have hereunto set forth my  
14 hand this 2nd day of November, 2009.  
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19 CHRISTINA GILSON, CSR NO. 9824  
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